Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. McCREARY - - - - *Petitioner,*

versus

COMMONWEALTH OF KENTUCKY - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

TEDDY B. GORDON
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February 12, 1996

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

26 pp

QUESTION PRESENTED FOR REVIEW

I. Did the Kentucky trial court violate Petitioner's Fifth and Fourteenth Amendment rights [against self incrimination] by allowing into evidence the Petitioner's refusal to submit to a breathalyzer test after Petitioner invoked his Miranda rights against self incrimination on the basis of the law enforcement authorities' informing Petitioner of the existence of outstanding arrest warrants against him on unrelated charges; and did the Kentucky trial court further violate Petitioner's constitutional rights by allowing the Commonwealth to make negative comments to the jury about Petitioner's invoking his Miranda rights?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. MCCREARY - - - - - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Thomas W. McCreary respectfully prays that a writ of certiorari issue to review the order and opinion of the Supreme Court of Kentucky denying discretionary review which upheld the denial of discretionary review by the Court of Appeals of the Commonwealth of Kentucky which upheld the opinion of the Jefferson Circuit Court of the Commonwealth of Kentucky, upholding the conviction of the Petitioner of driving under the influence which allowed into evidence the imputation of the Petitioner refusing the breathalyzer test after Petitioner invoked his Miranda rights that were given to him by the same officer who subsequently advised him that he did not have a right to counsel before he took the breathalyzer test. Petitioner was aware that he was being charged with other criminal offenses (warrants). Further, the order of the Jefferson

Circuit Court of the Commonwealth of Kentucky upholding the conviction of Thomas W. McCreary also upheld the Commonwealth's right (through the Assistant County Attorney) to comment on this imputed refusal to take the breathalyzer test.

PARTIES TO THE PROCEEDING

The caption of the case provides the names of all parties to this proceeding.

STATEMENT OF JURISDICTION

On November 15, 1995, the Supreme Court of Kentucky, case No. 95-SC-692-D, denied discretionary review of the decision of the Court of Appeals. A copy of that order is attached hereto as Appendix A. On July 18, 1995, the Court of Appeals of the Commonwealth of Kentucky, case No. 95-CA-1132-D, denied discretionary review of the order of the Jefferson Circuit Court of the Commonwealth of Kentucky. A copy of that order is attached hereto as Appendix B. On April 19, 1995, the Jefferson Circuit Court, Division 13, of the Commonwealth of Kentucky, case No. 95-XX-0009, entered an opinion and order affirming the decision of the Jefferson District Court, Criminal Traffic Division. A copy of that order is attached hereto as Appendix C. On or about January 19, 1995, order was entered overruling Defendant's Motion for New Trial and entered the order sentencing the Defendant, Thomas W. McCreary, recommended by the jury. A copy of that order is attached hereto as Appendix D.

The jurisdiction of the Supreme Court of the United States is conferred by 28 U.S.C. 1257(3) and Rule 13(1) et seq. of the Rules of the Supreme Court of the United States. Jurisdiction is further supported by the contradiction of the rulings of the United States Supreme Court in *South Dakota* v. *Neville*, 459 U.S. 553,103 S.Ct. 916, 74 L.Ed. 2nd 748 (1983); *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct.

2240, 49 L. Ed. 2d 91 (1976); *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) and other cases, all further in violation of the Petitioner's constitutional rights to self-incrimination and right to counsel and due process of law, guaranteed to him by the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

STATEMENT OF THE CASE

A. Material Facts

That on or about October 30, 1994, Thomas W. McCreary, Petitioner herein, (hereinafter referred to as Petitioner) was arrested by the City of Louisville Police Department for alleged violations of KRS 189A.010 (driving under the influence), KRS 189.210 (reckless driving) and speeding 10 miles over. The case was assigned docket No. 94T065945A, B and C. The trial of the case began on January 5, 1995 and concluded on January 6, 1995 with jury having found the Defendant (Petitioner herein) guilty, fined the Defendant and a motion for a new trial being overruled. Appeal was subsequently perfected from the jury decision and sentencing of the Jefferson District Court and Opinion and Order of the Jefferson Circuit Court, Hon. Geoffrey P. Morris, affirming the conviction, was entered of record April 19, 1995. Petitioner herein moved for Discretionary Review in the Court of Appeals of Kentucky and said motion was denied by Order entered July 18, 1995. Motion for Discretionary Review was then timely made to the Supreme Court of Kentucky which was denied November 15, 1995, with the Chief Justice Robert Stephens for granting discretionary review.

Prior to the beginning of trial, Thomas W. McCreary moved to suppress the results and/or testimony as to the results of the breathalyzer test in that the breathalyzer operator had advised the Petitioner herein of his Miranda

rights and the Petitioner had invoked those Miranda rights. VCR #13:40:00, 13:42:00 (Stipulation as to facts). This Motion to Suppress was overruled by the trial court. It is important to note that this trial was video-taped and all references are to the videotape citations as required by the Commonwealth of Kentucky.

The facts as stipulated in presentation of the motion to suppress were as follows:

1. Thomas W. McCreary was advised of his Miranda rights by Correctional and breathalyzer operator, Danny Marvel.

2. Thomas W. McCreary invoked his rights pursuant to the Miranda rights.

3. Thomas W. McCreary wanted to talk to his attorney before taking the breathalyzer test.

4. The same correctional officer who advised him of his Miranda rights and allowed Petitioner to invoke these rights then told him he did not have the right to talk to his attorney before taking the breathalyzer test.

5. Thomas W. McCreary was advised by the same correctional officer that he was being charged with other warrants.

In addition thereto, for purposes of the Federal question being presented, Thomas W. McCreary was never told that his refusal to take the test which was imputed to him could be used against him in the trial of this case; and the prosecutor, an Assistant County Attorney of Jefferson County, Kentucky, continually commented on Petitioner's refusal to take the breathalyzer test which refusal was based upon his invocation of his Miranda rights.

Counsel for the Petitioner herein further objected to the testimony of this same evidence at the trial-in-chief. VCR #16:45:11, 16:45:31, 16:46:24 through 50, 16:51:20 (Actual warnings given); 16:58:19 (Testimony by Defendant

as to requesting to talk to attorney); 16:58:39 (Testimony as to wanting to talk to attorney again, also involving other warrants that are pending); 17:01:40 (Requested to talk to attorney for third time, wherein breathalyzer operator then noted that Petitioner had now refused).

During the trial there were continuous comments on the Petitioner's refusal, which Petitioner's refusal was based upon his invocation of the Miranda rights that were given to him by the person in authority and, naturally, there were continuous objections to the breathalyzer operator's and the prosecutor's comments on his imputed "refusal" to take the breathalyzer test. VCR #14:16:20; 16:47:36; 16:47:46 through 16:49:00 (Continuing objection). These above material facts and review of the record containing those material facts constitutes the Petitioner's first argument in regard to his Miranda rights pursuant to the Fifth Amendment, Right against Self-Incrimination, of the United States Constitution, which will be discussed more fully hereinafter.

Further, since the commenting on the Petitioner's refusal to take the breathalyzer test was clearly done as an implication of guilt, Counsel for Petitioner herein once again objected to the testimony of the breathalyzer operator as to implied consent when the breathalyzer operator failed to specifically testify as to what was the exact language of the implied consent that was given to the Petitioner. VCR #16:57:04, 16:58:10.

Counsel for the Petitioner herein properly made motions at the close of Commonwealth's case and at the close of the entire case for directed verdicts which would encompass all the grounds for a reversal that are made herein if not previously objected to. VCR #17:07:07, 14:53:53.

Upon a factual consideration of a review of the evidence of the entire case, it is clear that the errors alleged for writ of certiorari of the Petitioner overwhelmingly caused

the conviction of the Petitioner with a severe punishment of four (4) months to serve which was imposed by the Trial Court. Petitioner prays for this writ of certiorari from that sentencing imposed on January 19, 1995. Although convicted of reckless driving and speeding 10 miles over, Petitioner chose not to appeal those minor charges.

B. Question of Law Presented for Review:

I. DID THE KENTUCKY TRIAL COURT VIOLATE PETITIONER'S FIFTH AND FOURTEENTH AMENDMENT RIGHTS [AGAINST SELF INCRIMINATION] BY ALLOWING INTO EVIDENCE THE PETITIONER'S REFUSAL TO SUBMIT TO A BREATHALYZER TEST AFTER PETITIONER INVOKED HIS MIRANDA RIGHTS AGAINST SELF INCRIMINATION ON THE BASIS OF THE LAW ENFORCEMENT AUTHORITIES' INFORMING PETITIONER OF THE EXISTENCE OF OUTSTANDING ARREST WARRANTS AGAINST HIM ON UNRELATED CHARGES; AND DID THE KENTUCKY TRIAL COURT FURTHER VIOLATE PETITIONER'S CONSTITUTIONAL RIGHTS BY ALLOWING THE COMMONWEALTH TO MAKE NEGATIVE COMMENTS TO THE JURY ABOUT PETITIONER'S INVOKING HIS MIRANDA RIGHTS?

This Petition for Writ of Certiorari in behalf of Thomas W. McCreary, the Petitioner, presents this Honorable Supreme Court of the United States of America a case of first impression to clarify and conclude this unanswered question of law not decided by this Honorable Supreme Court in your cases of *Miranda, Supra., Doyle, Supra.*, and *Neville, Supra.*

At this juncture, there is no question based upon the Material Facts presented and the record that Counsel herein has properly preserved this legal issue for review by this Honorable Supreme Court. I humbly believe that it is important, with unfortunately some replication of the facts to be included, to set the scenario of events or the stage, as to exactly what occurred in regard to this issue on October 30, 1994.

Obviously, the Petitioner, Thomas W. McCreary, after whatever disputed factual events occurred at the scene, is placed under arrest and transported to Metropolitan Corrections or the Jefferson County Correctional Department which is in the basement of the Hall of Justice in Jefferson County, Kentucky. It is unrefuted that when he is turned over to Danny Marvel, the correctional officer, to submit to a breathalyzer test, that Petitioner is aware that other warrants have been placed against him. As is further conceded, Danny Marvel, as does probably all of the fine officers that give breathalyzer tests throughout the Commonwealth of Kentucky, gives this Petitioner the Miranda rights. It is conceded that one can invoke his Miranda rights. The opportunity to do so appears on the form used in Jefferson County by the correctional officer giving or attempting to give the breathalyzer. In this case, as opposed to all other cases that have been previously decided, whether in the Commonwealth of Kentucky or by the Supreme Court of the United States, something different occurred. Not only did the Petitioner invoke his Miranda rights, which is conceded by all because it is marked on the form, but instead of this just being a DUI case, there was another problem. The other problem was that there were additional warrants outstanding on the Petitioner which he was clearly entitled to discuss with an attorney. The question for this Honorable Supreme Court to decide is whether or not this is a case of first impression that is uniquely different on the factual circumstances from all other cases previously decided as to Petitioner's rights pursuant to the Fifth Amendment.

The Circuit Court, in its Opinion, came down on the side of the line of cases that start with *Schmerber* v. *State of California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2nd 908 (1966) and the *United States* v. *Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2nd 1149 (1967). Petitioner concedes that he did not have a right to an attorney based

upon his Sixth Amendment rights under the Constitution of the United States of America and/or the Constitution of the Commonwealth of Kentucky. There is no question this part of the legal issue has been adjudicated.

The next part of this legal issue concerns those cases where there were Miranda rights given and the Petitioner, or any other defendant, is still not entitled to an attorney. The leading Kentucky case on this point which is a two-to-one decision out of the Court of Appeals is *Commonwealth Transportation Cabinet* v. *Cornell*, Ky. App. 796 S.W. 2d 591 (1990). By some of the authorities, much brighter than me, this has been entitled a "Miranda confusion" case. I assume these intellects in the field call this a Miranda confusion case because the defendant, in the middle of the night, sitting in a county jail somewhere, facing this authority figure, is given the opportunity to invoke his Miranda rights and he does, and is then specifically told that he can no longer invoke them. Perhaps any of us would be confused. But in this particular case it is clear that the Petitioner has the opportunity to be confused and, thus, the title "Miranda confusion" does fit the facts and circumstances of this case. It is also conceded that the Petitioner was not advised his refusal could be used against him.

Prior to the decision of the *Commonwealth ex rel. Transportation Cabinet* v. *Cornell, supra.* are the decisions of *Newman* v. *Stinson*, Ky. 489 S.W. 2d 826 (1972), *Newman* v. *Hacker*, Ky. 530 S.W. 2d 376 (1975) and *Elkin* v. *Commonwealth ex rel. Dept. of Transportation*, Ky. App. 646 S.W. 2d 45 (1982). These cases ending with *Cornell, Supra.* hold that the defendant, at this juncture, also has no Fifth Amendment right to consult with his attorney, the exception being the 2 to 1 decision in *Cornell, supra.*

This Honorable Supreme Court clearly should decide whether or not these particular factual circumstances are

so distinguishable from the administrative process that the defendant Cornell was going through in that case, and the decisions of Miranda, Neville and Doyle, that it should be decided once and for all by this Honorable Supreme Court if there is any occasion whatsoever where, when Miranda rights are given to a defendant, he is entitled to the full benefit and to rely on his invocation of those Miranda rights rather than being subsequently penalized for invoking the rights from the law enforcement officer giving him those rights.

The Circuit Court (the only written opinion in this case) did not in any manner review whether or not the Petitioner had carved out an exception under his Fifth Amendment right to counsel that would allow suppression of evidence. If this question and/or legal issue stood alone, this Petition for Writ of Certiorari would not have been made; but this legal issue now becomes compounded because based upon current case law in existence, the Commonwealth may now comment on the defendant's refusal. If the refusal isn't bad enough, the commenting on the refusal is a clear implication of guilt. See: *South Dakota* v. *Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) and *Commonwealth* v. *Hager*, Ky. 702 S.W. 2d 431 (1986). The difference between McCreary, the defendant, and Neville, the defendant, was that Neville never invoked his Miranda rights. Therefore, this McCreary case is totally and completely distinguishable from *Neville, supra.* and *Hager, supra.* This Honorable Supreme Court must decide whether or not the Petitioner has carved out another specific issue to be finally adjudicated by this Honorable Supreme Court which is whether or not the prosecutor can comment on the defendant's refusal to take the breathalyzer test even if he invoked his Miranda rights. Counsel herein strongly submits that the omission of the Petitioner's constitutional rights are so overwhelming that he was totally denied a fair trial.

It is clear that *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) was rendered in an attempt to end forced confessions. The Supreme Court, once and for all, was trying to end any type of coercion while a defendant was in "custodial interrogation" so that a confession would be truly free and voluntary. "...Unless compulsion, inherent in custodial surroundings is dispelled, no statement is truly a product of free choice...." (*Miranda* v. *Arizona*, *supra*. 384 U.S., p. 458). It is further conceded that the prosecutor cannot comment on the defendant's invoking his Miranda rights. See *Griffin* v. *California*, 38 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Counsel further submits that the prosecutor not only cannot comment on the defendant's rights to invoke his Miranda rights and remain silent, but the prosecutor also cannot comment on the defendant's right to remain silent unless the defendant was fully warned of the consequences of his refusal. His silence, based upon the invocation of his Miranda rights, will and cannot be used against him as a constitutional violation as well as violative of his right of due process. See *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

In the scenario of events, we left this Honorable Supreme Court at the juncture where Danny Marvel, the correctional officer had given the Petitioner his Miranda rights and the Petitioner had invoked those Miranda rights. Twenty (20) minutes or more then pass, Petitioner relies on his Miranda rights, wants to know about the other warrants and does not comply when requested in taking the breathalyzer test. As is the procedure as well as the law, the correctional officer then imputes this as a "refusal." We then went forward to the trial of this action where the prosecutor has a field day commenting on the Petitioner's refusal. What happened differently in this case is that the prosecutor, in commenting on his refusal to take the breathalyzer test, is in actuality commenting on Thomas

McCreary's right to invoke his Miranda rights; McCreary never actually refused to take the test; he just wanted to talk to his lawyer first.

In either event, counsel herein does not believe that *Neville, supra, Schmerber, supra* and *Hager, supra,* which have been distinguished, can overcome the rights of McCreary that he has pursuant to *Miranda* and *Doyle.* Minimally, Petitioner prays that this Honorable Supreme Court grant his Motion for a Writ of Certiorari to decide that its holding in *Doyle* should continue and, if necessary, be expanded that the prosecution does not have the right to comment on Petitioner's invocation of his Miranda rights once properly given to him. The Petitioner, once having accepted these Miranda rights offered to him, should be entitled to rely on these rights rather than have the same rights used against him as an implication of guilt.

Hopefully, Counsel has painted a sufficient picture of the scenario of events that would allow this Honorable Supreme Court to realize that the 25 minutes that this defendant spent in the cubicle area in the company with the breathalyzer operator, Danny Marvel, was a crucial 25 minutes to the entire life of this defendant. Depending on what this Honorable Supreme Court decides is or is not his constitutional rights, this defendant faces severe imprisonment of four (4) months, large fines, loss of license for one year and the resultant events that occurred to one's own life when these catastrophic events occur.

Respectfully submitted,

TEDDY B. GORDON
807 West Market Street
Louisville, Kentucky 40202
(502) 585-3534
Attorney for Petitioner

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Petition for Writ of Certiorari were mailed to the Supreme Court of the United States, One 1st Street, N.E., Washington, D.C. 20543; Hon. Janet Reno, United States Attorney General, 5111 Main Justice Building, Tenth Street & Constitution Avenue, N.W., Washington, D.C. 20530; Hon. Ben Chandler, Attorney General of the Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209 Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601; Hon. Mark Murphy, Commonwealth Attorney, 514 W. Liberty St., Louisville, KY 40202; Hon. Don Armstrong, Assistant County Attorney, 310 W. Liberty St., Suite 514, Louisville, KY 40202; Hon. Geoffrey P. Morris, Circuit Court Judge, Thirteenth Division, Hall of Justice, 600 W. Jefferson St., Louisville, KY 40202; Hon. Deborah Deweese, District Court Judge, Hall of Justice, 600 W. Jefferson St., Louisville, KY 40202; Hon. Tony Miller, Clerk, Jefferson Circuit Court, Hall of Justice, 600 W. Jefferson St., Louisville, KY 40202; and Hon. Joseph Fowler, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601 on this 12th day of February, 1996.

Teddy B. Gordon

TEDDY B. GORDON
807 West Market Street
Louisville, Kentucky 40202
(502) 585-3534
Attorney for Petitioner

APPENDIX

CERTIFICATE OF SERVICE

It is hereby certified that copies of the foregoing Petition for Writ of Certiorari were mailed to the Supreme Court of the United States, One 1st Street, N.E., Washington, D.C. 20543; Hon. Janet Reno, United States Attorney General, 5111 Main Justice Building, Tenth Street & Constitution Avenue, N.W., Washington, D.C. 20530; Hon. Ben Chandler, Attorney General of the Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601; Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Room 209, Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601; Hon. Mark Murphy, Commonwealth Attorney, 514 W. Liberty St., Louisville, KY 40202; Hon. Don Armstrong, Assistant County Attorney, 514 W. Liberty St., Suite 514, Louisville, KY 40202; Hon. Geoffrey P. Morris, Circuit Court Judge, Thirteenth Division, Hall of Justice, 600 W. Jefferson St., Louisville, KY 40202; Hon. Deborah Deweese, Division [illegible] Hall of Justice, 600 W. Jefferson St., Louisville, KY 40202; Hon. Tony Miller, Clerk, Jefferson Circuit Court, Hall of Justice, 600 W. Jefferson St., Louisville, KY 40202; and Hon. Joseph Fowler, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601 on this 12th day of February, 1998.

APPENDIX

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APPENDIX A

SUPREME COURT OF KENTUCKY

95-SC-692-D
(95-CA-1132)

THOMAS W. MCCREARY - - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent*

Jefferson Circuit Court
No. 95-XX-09

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C.J., would grant discretionary review.

ENTERED: November 15, 1995.

/s/ Robert F. Stephens
Chief Justice

APPENDIX B

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 95-CA-1132-D

THOMAS W. MCCREARY - - - - - - - - - *Movant*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent*

On Motion for Discretionary Review
From Jefferson Circuit Court
Action No. 95-XX-009

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

BEFORE: LESTER, CHIEF JUDGE; GARDNER AND JOHNSON, JUDGES.

This Court, having considered the motion for discretionary review and the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby DENIED.

ENTERED: July 18, 1995.

/s/ John A. Gardner
Judge, Court of Appeals

APPENDIX C

JEFFERSON CIRCUIT COURT

DIVISION THIRTEEN (13)

Case No. 95 XX 0009

THOMAS MCCREARY - - - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - - - - *Appellee*

Appeal From Jefferson District Court
Criminal Division
Case No. 94 TO65945A

OPINION AND ORDER—Entered April 19, 1995

This action comes before the Court on an Appeal from Jefferson District Court, Criminal Traffic Division. The appellant, Thomas McCreary ("Mr. McCreary") has filed a Statement of Appeal and the appellee, the Commonwealth of Kentucky ("the Commonwealth") has filed a Counterstatement.

OPINION

Mr. McCreary was arrested by the an officer of the Louisville Police Department on October 30, 1994 for Driving Under the Influence, Reckless Driving and Speeding 10 miles over the speed limit. A trial was held on January 5 and 6, 1995 in Jefferson District Court. The jury found the appellant guilty of all charges. Mr. McCreary now asserts there were several errors during the trial.

To begin, Mr. McCreary contends that the trial court erred when it failed to suppress the absence of a breathalyzer test when he had been given his Miranda warning and had invoked these rights. Mr. McCreary asserts that, while he did not specifically refuse to submit to the breathalyzer test, he invoked his right to confer with

an attorney per the operator and that the breathalyzer operator took his subsequent request to contact his attorney as refusal to submit to a breathalyzer test.

Mr. McCreary also asserts that the Commonwealth commented repeatedly on his silence after he was advised of his rights and that it was impermissible for it to do so.

The Supreme Court of the United States has held that a defendant does not have the right to have an attorney present prior to submitting to a breath test. The Court has found that the test is a search rather than an admission of guilt. See: *Schmerber* v. *State of California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *United States* v. *Wade*, 388 U.S. 218, 87 S. Ct.-1926, 18 L.Ed. 2d 1149 (1967)

In the case at bar, the defendant was given his Miranda warning and the breathalyzer operator explained the implied consent law, KRS 186.565. The defendant would not give an answer as to whether he was refusing the test, but continued to ask for his attorney. Officer Daniel Marvel, the breathalyzer operator, finally concluded that the defendant was refusing the test based upon his actions. The trial court did not err in allowing this testimony into evidence nor did the defense counsel err in informing the jury that Mr. McCreary had refused.

The next error which the appellant contends was that the trial court did not admonish the jury prior to a recess. RCr 9.70 reads as follows:

> The jurors, whether permitted to separate or kept in charge of officers, must be admonished by the court that it is their duty not to permit anyone to speak to, or communicate with, them on any subject connected with the trail, and that all attempts to do so should be immediately reported by them to the court, and that they should not converse among themselves on any subject connected with the trial, nor form, nor express any opinion thereon, until the cause be finally submitted to them. This admonition must be given or referred to by the court at each adjournment.

The trial tape was turned off prior to the jury leaving the court room, but it does not have the admonishment recorded thereon. After the brief recess, however, counsel for the appellant moved for a mistrial stating that he was not sure whether the trial court had admonished the jury. The trial judge then stated, on the record, that she had admonished the jury prior to the recess and the prosecutor stated that she would swear to the fact that the trial judge had done so. For purposes of review, this Court cannot find that the trial judge had not so admonished when she stated unequivocally on the record that she had done so and when the prosecutor supported her statement.

Regardless, the Supreme, Court of Kentucky has held numerous times that, in the absence of a showing of misconduct, substantial compliance with RCr 9.70 will suffice. See: *Schweinefuss* v. *Commonwealth*, Ky., 395 S.W.2d 370 (1965); *Leigh* v. *Commonwealth*, Ky., 481 S.W.2d 75 (1972); and *Commonwealth* v. *Messex*, Ky., 736 S.W.2d 341 (1987). Clearly there was no showing of misconduct under the present facts.

The appellant also contends that it was reversible error when Officer Howard, the arresting officer testified that he believed the appellant would have blown above a .10 due to his performance in the field sobriety test. Counsel for appellant objected to this testimony and the trial judge made an admonition to the jury to disregard the testimony. Given the testimony of Officer Howard on how the appellant performed on the field sobriety test and the admonition from the trial court, this Court does not believe that the statement was unduly prejudicial.

Next, the appellant contends that the trial court erred in permitting Instruction No. 2 to go before the jury. The first draft of the instruction was as follows:

> The law presumes a defendant to be innocent of a crime, and the warrant against the defendant shall not be considered as evidence or as having any weight against him. You shall find the Defendant not guilty unless you are satisfied from the evidence alone, and

> beyond reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

Counsel for the appellant had wanted the instruction as prepared above to be given to the jury because he was concerned that the other warrants which were involved in the appellant's arrest would unduly prejudice the jury. The prosecutor, however, argued that the warrant should not be included in the instruction and the trial court so ruled. The trial court thereafter delineated the phrase" ... and the warrant against the Defendant shall not be considered as evidence or as having any weight against him . . ."

The trial court then proceeded to read the Instruction to the jury as follows:

> The law presumes a defendant to be innocent of a crime. You shall find the Defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

Subsequent to instructing the jury in this manner, closing arguments were presented by both sides. Afterward, the trial judge decided to re-instruct the jury and did so including language to the effect that the citation of arrest against the Defendant shall not be considered as evidence or as having any weight against him.

This Court can find nothing wrong with the manner in which the trial judge instructed the jury and the final instruction was nearly identical to the first one which the appellant had approved.

The final error which the appellant alleges is that the judge should not have allowed the "guilt or innocence" phase of the trial to be tried at the same time as the "sentencing" phase of the trial.

KRS 532.055 provides that all felony trials shall be bifurcated into two (2) parts. The first part shall be the determination of whether the defendant is guilty or innocent, the "guilt or innocence", phase. The second phase

shall be the determination of the punishment to be imposed (the "sentencing" phase). The present case, however, did not involve a felony, but a misdemeanor. There is no such requirement for misdemeanor trials. Consequently, it was not in error for the trial judge to hold the two phases of the trial together. Also, it was not error for the Commonwealth to mention the previous DUI conviction since it was evident to the jury in determining sentencing that he had been previously convicted as he was here charged with DUI in the second degree.

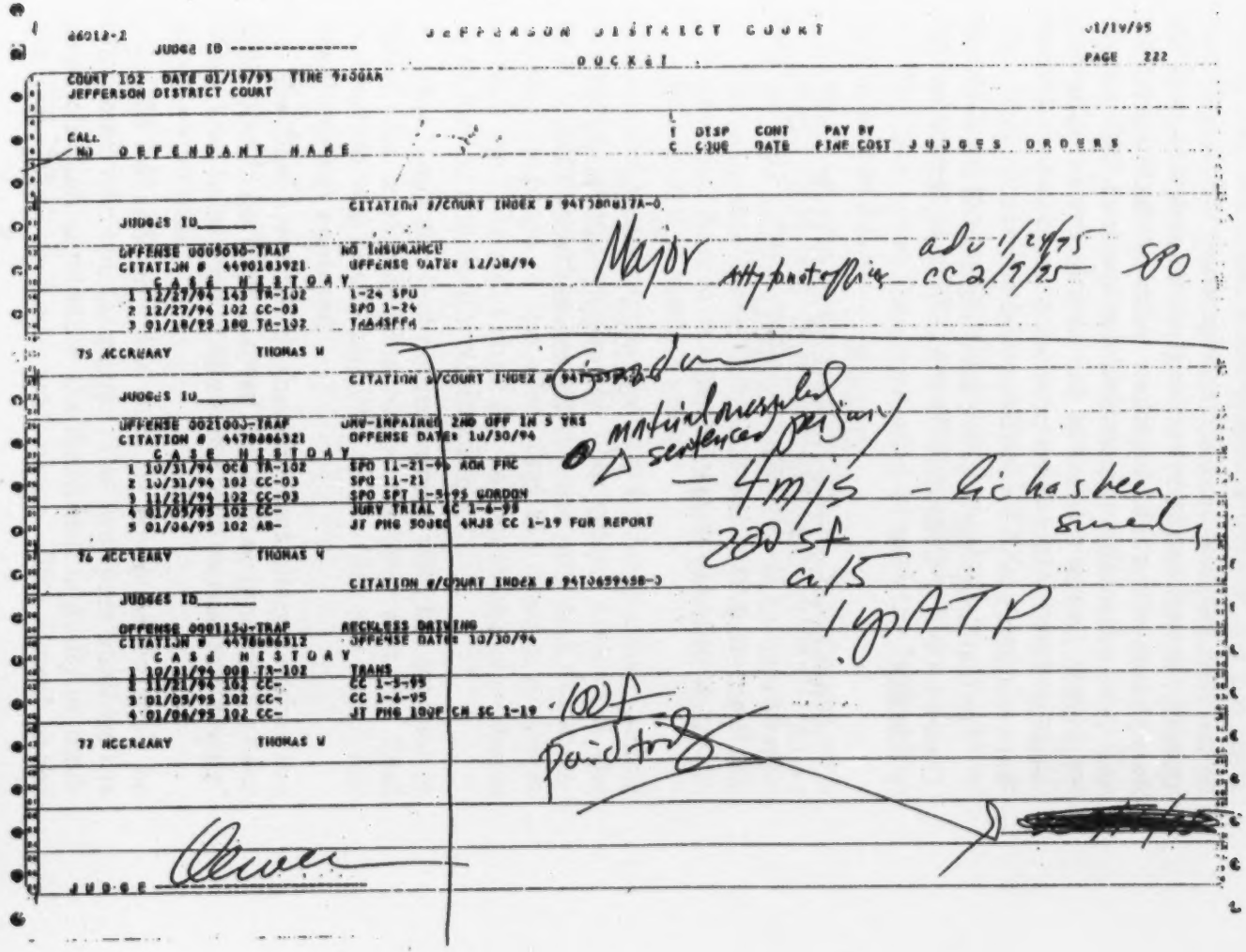
For the foregoing reasons, the Judgment of the Jefferson District Court, Criminal Traffic Division, must be AFFIRMED.

ORDER

WHEREFORE IT IS ORDERED AND ADJUDGED that the decision of the Jefferson District Court, Criminal Traffic Division, be and hereby is AFFIRMED.

This 19th day of April, 1995.

/s/ Geoffrey P. Morris
Geoffrey P. Morris, Judge
Jefferson Circuit Court



26012-2 JEFFERSON DISTRICT COURT 01/19/95
JUDGE ID ---------- DOCKET PAGE 222

COURT 102 DATE 01/19/95 TIME 9:59AM
JEFFERSON DISTRICT COURT

CALL NO DEFENDANT NAME — L I C DISP DATE — CONT DATE — PAY BY FINE COST — JUDGES ORDERS

CITATION #/COURT INDEX # 94T3800172A-0

JUDGES ID_____

OFFENSE 0005030-TRAF NO INSURANCE
CITATION # 4490183921 OFFENSE DATE: 12/30/94

CASE HISTORY
1 12/27/94 143 TR-102 1-24 SPD
2 12/27/94 102 CC-03 SPD 1-24
3 01/19/95 109 TR-102 THIS ENTRY

75 MCCREARY THOMAS W

Major Attempt to Elude adv 1/24/95 CC 2/9/95 $80

CITATION #/COURT INDEX # 94T3859280

JUDGES ID_____

OFFENSE 0021003-TRAF UNL-IMPAIRED 2ND OFF IN 5 YRS
CITATION # 4478866521 OFFENSE DATE: 10/30/94

CASE HISTORY
1 10/31/94 OCB TR-102 SPD 11-21-94 ADM FNC
2 10/31/94 102 CC-03 SPD 11-21
3 11/21/94 102 CC-03 SPD SPT 1-5-95 GORDON
4 01/05/95 102 CC- JURY TRIAL CC 1-6-95
5 01/06/95 102 AB- JT PHG SCHED 4MJB CC 1-19 FOR REPORT

76 MCCREARY THOMAS W

Gordon
motion suppress Denied
sentenced 90 days
- 4m/s - Richasberry
200 ft
cc 15
1yr ATP

CITATION #/COURT INDEX # 94T3859458-0

JUDGES ID_____

OFFENSE 0001150-TRAF RECKLESS DRIVING
CITATION # 4478866512 OFFENSE DATE: 10/30/94

CASE HISTORY
1 10/31/94 008 TR-102 TRANS
2 11/21/94 102 CC- CC 1-5-95
3 01/05/95 102 CC- CC 1-6-95
4 01/06/95 102 CC- JT PHG 109P CH SC 1-19

77 MCCREARY THOMAS W

100 ft
Paid trial

JUDGE _____

BEST AVAILABLE

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66J1a-1 JUDGE ID ---------- JEFFERSON DISTRICT COURT 01/19/95

DOCKET PAGE 233

COURT I32 DATE 01/19/95 TIME 9:00AM
JEFFERSON DISTRICT COURT

CALL
NO DEFENDANT NAME I DISP CONT PAY BY FINE COST JUDGES ORDERS
C CODE DATE

CITATION #/COURT INDEX # 94T0693454-0

JUDGES ID_____

OFFENSE 6660190-TRAF SPEEDING 10MPH OVER
CITATION # 4478886313 OFFENSE DATE: 10/30/94
CASE HISTORY
1 10/31/94 G06 TR-I02 TRANS
2 11/21/94 I02 CC- CC 1-5-95
3 01/03/95 I02 CC- CC 1-6-95
4 01/04/95 I02 CC- JT FHG SOF CM SC 1-19

70 MCGILL DEBORAH M

CITATION #/COURT INDEX # 94T0812664A-0

JUDGES ID_____

OFFENSE 6JU4240-TRAF EXPIRED OR NO REG PLATES
CITATION # 4479176711 OFFENSE DATE: 12/08/94
CASE HISTORY
1 12/22/94 I31 TR-I32 RANKIN TR132 1-19-95 SPO
2 12/22/94 I02 CC-23 SPO 1-19

77 MCGILL DEBORAH M

CITATION #/COURT INDEX # 94T0[illegible]

JUDGES ID_____

OFFENSE 6JU5050-TRAF NO INSURANCE
CITATION # 4479176821 OFFENSE DATE: 12/08/94
CASE HISTORY
1 12/22/94 I31 TR-I32 RANKIN TR132 1-19-95 SPO
2 12/22/94 I02 CC-23 SPO 1-19

81 ROSEE WILLIE O

CITATION #/COURT INDEX # 94T0676648-0

JUDGES ID_____

OFFENSE 6JU1496-TRAF OHV WHO INF INTOX 1ST OFFENSE
CITATION # 4481550821 OFFENSE DATE: 12/04/94
CASE HISTORY

JUDGE

NA filed 1/19/95
D for pending appeal & before time

Rank

PD

30d c/d 2y SC

PD

9a

(2)

Supreme Court, U.S.
FILED
MAR 15 1996
CLERK

No. 95-1281

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

THOMAS W. MCCREARY - - - - *Petitioner*

versus

COMMONWEALTH OF KENTUCKY - *Respondent*

BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Counsel for Respondent

**Counsel of Record*

March 15, 1996

WESTERFIELD-SONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

14 pp

QUESTION PRESENTED FOR REVIEW

I. The Movant has presented the following question to this Court for Review: Whether the Kentucky trial court violated the Movant's Fifth and Fourteenth Amendment rights against self incrimination by allowing into evidence proof of the Movant's refusal to submit to a breath test and allowing the Commonwealth to comment on that refusal at trial after the Movant had been informed of his Miranda rights by law enforcement officers after he was informed of outstanding arrest warrants against him on unrelated charges.

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No. 95-1281

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THOMAS W. MCCREARY - - - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

May It Please The Court:

Comes the Respondent, the Commonwealth of Kentucky, by counsel, and for its Response to the Petition for a Writ of Certiorari to the Supreme Court of the United States, states as follows:

INTRODUCTION

The Movant has requested this Honorable Court to issue a Writ of Certiorari to the Supreme Court of Kentucky to review the decision of the Supreme Court of Kentucky which denied the Movant discretionary review, declining to review the decision of the Court of Appeals of Kentucky's denial of discretionary review, which declined to review the Jefferson Circuit Court's decision to AFFIRM the conviction of the Movant for Driving Under the Influence of

Alcohol, Second Offense within the last five years. Movant did not appeal his convictions for Reckless Driving and Speeding. For the following reasons, Respondent prays that this Honorable Court not issue the Writ.

OPINIONS BELOW

A true copy of the opinion of the Supreme Court of Kentucky can be located at page 1a of the Appendix contained in Movant's Petition for Writ of Certiorari. A true copy of the opinion of the Court of Appeals of Kentucky can be located at page 2a of the Appendix contained in Movant's Petition for Writ of Certiorari. A true copy of the opinion of the Jefferson Circuit Court can be located at pages 3a-7a of the Appendix contained in Movant's Petition for Writ of Certiorari. A true copy of the opinion of the trial court, the Jefferson District Court, can be located at pages 8a-9a of the Appendix contained in Movant's Petition for Writ of Certiorari.

PARTIES TO THE PROCEEDING

The Movant is Thomas W. McCready. The Respondent is the Commonwealth of Kentucky. No other parties to the proceeding are known to the Respondent.

STATEMENT OF MATERIAL FACTS

On or about October 30, 1994, Officer Charles Howard of the Louisville Division of Police, at about 12:50 a.m., observed the Movant, Thomas W. McCreary, (hereinafter "Movant") driving northbound on Third Street at a high rate of speed and in a very erratic manner. Officer Howard testified that the Movant was weaving in both northbound lanes of Third Street and further crossed over the center line of the road, into the southbound lanes of Third Street, causing another vehicle to swerve in order to avoid being struck by Movant's vehicle. Officer Howard paced the Movant's vehicle with his own police cruiser doing 54 miles per hour in a posted 35 mile per hour zone.

Officer Howard activated his emergency lights and siren, however, Movant did not immediately stop his vehicle, but proceeded to turn a corner and enter a driveway some four doors down the street. Upon exiting the vehicle, Movant told Officer Howard that this house was his destination.

Officer Howard could smell alcohol on Movant's breath, even though Movant attempted to speak downwards towards the ground, so that Officer Howard could not smell his breath. Officer Howard, believing Movant to be under the influence of alcohol, gave the Movant five field sobriety tests, of which Movant failed all five. The Movant was informed of his Miranda rights, and placed under arrest for Driving Under the Influence of Alcohol, Second Offense within the last five years, Reckless Driving, and Speeding more that 10 miles over the posted speed limit. Officer Howard began to transport Movant to the jail. In doing so, he was informed by police radio that Movant had three outstanding warrants for his arrest on other matters.

Upon reaching the jail, Movant was immediately turned over to Corrections Officer Daniel Marvel. Officer Marvel is a Breath Test Operator, and further, is a Breath Test Maintenance Technician. Officer Marvel again informed Movant of his Miranda rights, and further requested that Movant submit to a breath test to determine the alcohol content of his breath. Movant requested that he be allowed to speak to his attorney, at which time Officer Marvel ceased all questioning of the Movant, however, Officer Marvel insisted that Movant submit to the breath test. Movant stated that he wished to speak to his attorney prior to submitting to the breath test. Officer Marvel verbally instructed the Movant that according to certain United States Supreme Court cases, he was not entitled to speak to his attorney prior to submitting to a test of his breath. Movant continued to request to speak to his attorney prior to submitting to the breath test, at which point Officer

Marvel regarded this act as a refusal to submit to the breath test, and terminated the session. Officer Marvel was able to form an opinion of the sobriety of the Movant based upon his observations, and he concluded that Movant was under the influence of intoxicants at that time.

Movant made a motion to the trial court to suppress the breath test, based upon his Miranda "confusion." Movant argued that he was entitled to speak to his attorney prior to taking the breath test, since he had arrest warrants on other pending matters against him at the time. The trial court overruled this motion, stating that Movant had no right to speak to his attorney prior to taking the breath test.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR BY NOT SUPPRESSING THE MOVANT'S BREATH TEST ON THE GROUNDS OF "MIRANDA CONFUSION", SINCE THE MOVANT DID NOT HAVE A RIGHT TO SPEAK TO HIS ATTORNEY PRIOR TO GIVING THE BREATH SAMPLE. THEREFORE, THE OPINIONS OF THE JEFFERSON CIRCUIT COURT, THE COURT OF APPEALS OF KENTUCKY, AND THE SUPREME COURT OF KENTUCKY WHICH UPHELD THE TRIAL COURT ARE NOT IN ERROR.

Movant argues that the trial court, the Jefferson District Court, erred when it failed to suppress the results of the breathalyzer test offered to the Movant after the Movant had first been given his Miranda warnings, and had invoked those rights by asking to speak to his attorney. The Commonwealth of Kentucky states that since the Movant had no right to speak to his attorney prior to giving the breath sample, there was no error in not suppressing this test.

First, the Commonwealth would state that the only one who seems to have "Miranda Confusion" is the Movant. Movant seems to have confused his Fifth Amendment right to remain silent with his Sixth Amendment right to counsel. Movant has argued that because he had also been charged with other outstanding warrants that were discovered by Officer Howard on the way to the jail, that he was entitled to exercise his right to counsel before any breath test could be taken. This is just not the case.

The agent of the Commonwealth, Officer Daniel Marvel, immediately ceased all questioning of the Movant when Movant asked to speak to his attorney. This was proper. However, Officer Marvel insisted on administering the breath test, since Movant had no right to speak to an attorney prior to being offered this test.

This Court has found that a defendant does not have the right to have an attorney present prior to submitting to a breath test. The Court found that the breath test was a search of the person of the defendant rather than a statement or admission by the defendant. *Schmerber* v. *State of California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Therefore, a defendant charged with DUI does not have a right to an attorney prior to submitting to this test, since it is not giving evidence against himself in violation of his Fifth Amendment right to remain silent. The fact that the Movant had outstanding warrants for his arrest at the time should not change this rule. Officer Marvel did not question Movant about the outstanding warrants. In fact, it is not disputed that Officer Marvel ceased all questioning when the Movant stated that he wanted to speak to his attorney. However, Officer Marvel did insist upon administering the breath test in the drunk driving case. The breath test had absolutely nothing to do with the cases involved with the outstanding warrants.

Since the drunk driving case had absolutely nothing to do with the cases involved with the outstanding warrants,

and Officer Marvel correctly ceased all questioning of the Movant upon Movant exercising his right to counsel, there should be no argument that Movant's Constitutional rights were violated. Pursuant to *Schmerber, supra*, Movant had no right to counsel being present prior to submitting to the breath test and all other questioning ceased, therefore, none of Movant's rights were violated. The two cases had nothing to do with each other. The warrants were completely separate cases from the drunk driving case. The Commonwealth of Kentucky should be entitled to administer the breath test as quickly as possible to preserve the evidence, and not have to wait for the delay which would inevitably occur if the Movant was allowed to speak to his attorney on a totally unrelated matter prior to the administration of the breath test.

In *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), this Court further held that procedures such as fingerprinting and the taking of blood or breath samples for analysis were not critical stages of a prosecution so as to require the presence of counsel under the Sixth Amendment. Therefore, Movant was not entitled to speak to his attorney prior to the breath test. Since the breath test had absolutely no relation to the outstanding arrest warrants, the administration of the breath test would not violate the rights of the Movant on the totally unrelated charges. After Movant had taken the breath test, if he had done so, he would have been placed in a holding cell where there are two telephones with which he could have contacted his attorney to speak about the outstanding warrants as well as the drunk driving charge. None of Movant's Constitutional rights were violated. No questions were asked of Movant after he invoked his right to counsel. He was only requested to submit to the breath test, for which he does not have a Fifth Amendment right or a Sixth Amendment right to counsel.

Kentucky case law follows the reasoning of this Court's cases. In *Newman* v. *Stinson,* Ky., 489 S.W.2d 826 (1972), the then Court of Appeals of Kentucky (now the Supreme Court of Kentucky) held that the Fifth Amendment right to remain silent was not involved in the taking of breath samples for analysis for the reason that the administration of such tests are searches of the person of the defendant for evidence rather than a compulsion of testimony.

In *Newman* v. *Hacker,* Ky., 530 S.W.2d 376 (1975), the then Court of Appeals of Kentucky held that a defendant had no right to have counsel present at the time the breathalyzer test was administered. This reasoning was followed in *Elkin* v. *Commonwealth ex rel. Department of Transportation,* Ky.App., 646 S.W.2d 45 (1982).

In *Commonwealth ex rel. Transportation Cabinet* v. *Cornell,* Ky.App., 796 S.W.2d 591 (1990), the present Court of Appeals of Kentucky went through a discussion of the applicable law and concluded that a defendant has "no right to consult with his attorney or to have his attorney present during the taking of the [breath] test so the *Miranda* rights were not applicable . . . ." There was no error in admitting the refusal to submit to the breath test, since Movant had no right to counsel prior to submitting to the test, and the outstanding warrants had nothing to do with the drunk driving case. In addition, all questioning of the Movant ceased upon his exercise of his right to have his attorney present.

Movant argues that the Commonwealth was allowed to comment on his refusal to take the breath test and that these comments somehow prejudiced him in front of the jury. In *Commonwealth* v. *Hager,* Ky., 702 S.W.2d 431 (1986), the Supreme Court of Kentucky overruled their prior holding in *Hovious* v. *Riley,* Ky., 403 S.W.2d 17 (1966), in light of the case of this Court's holdings in *South Dakota* v. *Neville,* 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d

748 (1983). In *Neville*, this Court held that the admission into evidence of a defendant's refusal to submit to a blood alcohol test does not offend his Fifth Amendment right against self-incrimination. In *Hagler*, the Supreme Court of Kentucky was urged to adopt more stringent rules of constitutional construction than the United States Supreme Court had set forth in *Neville*, however, they declined to do so. Therefore, commenting on the Movant's failure to take the breath test that was offered to him by Officer Marvel was not a violation of his Fifth Amendment right to remain silent either under Kentucky law or the law as set forth by the United States Supreme Court.

Since there was no error in admitting the Movant's refusal to take the breath test, nor in allowing the Commonwealth to comment about said refusal during the trial, this Court should uphold the Kentucky Courts on this issue, and refuse to issue the Writ of Certiorari. .

CONCLUSION

The trial court and Circuit Court in review of the trial court did not err in not suppressing the Movant's breath test and the Court of Appeals and the Supreme Court of Kentucky did not err in refusing to grant discretionary review of the lower courts' opinions, since the Movant did not have a right to speak to his attorney prior to being required to submit or decline to submit to giving a breath sample, and the Commonwealth was allowed to comment during trial on his refusal to submit to the breath test, without offending Movant's Fifth Amendment right against self-incrimination or his Sixth Amendment right to counsel.

Respectfully submitted,

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Counsel for Respondent

**Counsel of Record*

CERTIFICATE OF SERVICE

This is to certify that a true copy of the following Brief in Opposition to Petition for Certiorari to the Supreme Court of the United States has been mailed, postage prepaid, to: The Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543; Hon. Teddy B. Gordon, 807 West Market Street, Louisville, KY 40202; Attorney for Movant; Hon. Geoffrey P. Morris, Judge, Jefferson Circuit Court, Thirteenth Division, Third Floor, Hall of Justice, 600 West Jefferson Street, Louisville, KY 40202; Hon. Deborah DeWeese, Judge, Jefferson District Court, First Floor, Hall of Justice, 600 West Jefferson Street, Louisville, KY 40202; Hon. Marc Murphy, Commonwealth's Attorney for the 30th Judicial District, 514 West Liberty Street, Louisville, KY 40202; Hon. Ben Chandler, Attorney General of Kentucky, Capitol Building, Frankfort, KY 40601; Hon. Mike Conliffe, Jefferson County Attorney, First Floor, Hall of Justice, 600 West Jefferson Street, Louisville, KY 40202; Hon. Janet Reno, Attorney General of the United States, 5111 Main Justice Building, Tenth Street & Constitution Avenue, N.W., Washington, D.C. 20530; Mr. Tony Miller, Clerk of the Jefferson Circuit Court, Second Floor, Hall of Justice, Louisville, KY 40202; Hon. George E. Fowler, Jr., Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601; and Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, Capitol Building, Frankfort, KY 40601; on this the 14 day of March, 1996.

DONALD E. ARMSTRONG, JR.*
Assistant Jefferson County Attorney
Counsel for Respondent